Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [10/12/90]

CASE NBR: [90105395] CSY STATUS: [DECIDED]
SHORT TITLE: [House, Paul]
VERSUS [Tennessee] DATE DOCKETED: [080390]
*** CAPITAL CASE -- Stay granted by lower court *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	May 24 1990	G	Application (A89-843) to extend the time to file a petition for a writ of certiorari from June 4, 1990 to August 3, 1990, submitted to Justice Scalia.
2	May 25 1990		Application (A89-843) granted by Justice Scalia extending the time to file until August 3, 1990.
3	Aug 3 1990	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Aug 20 1990		Brief of respondent Tennessee in opposition filed.
6	Aug 30 1990		DISTRIBUTED. September 24, 1990
8	Sep 28 1990		REDISTRIBUTED. October 5, 1990
10	Oct 9 1990		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall. (Detached opinion.) Justice Souter OUT.

****

EDITOR'S NOTE

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ORIGINAL

90-5395

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990
No. _____

PAUL GREGORY HOUSE, Petitioner

v.

STATE OF TENNESSEE, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTION PRESENTED FOR REVIEW

The question presented is whether the Tennessee Capital Punishment Statute, T.C.A. Section 39-2-203, is constitutionally incompatible with the Eighth and Fourteenth Amendments to the United States Constitution.

A. Whether the jury may have reasonably perceived that the Tennessee Capital Punishment Statute, T.C.A. Section 39-2-203, as explained by the Trial Court's instructions to them, did not allow them to give any effect to any mitigating circumstances/ evidence unless all twelve (12) jurors were in unanimous agreement as to the existence of a particular mitigating circumstance.

B. Whether the Tennessee Capital Punishment Statute, T.C.A. Section 39-2-203, as explained by the Trial Court's instructions, is void for vagueness, in that it does not assign any standard for weighing mitigating circumstances against aggravating circumstances and does not establish which side has the burden of proving which outweighs the other.

LIST OF PARTIES

The only parties to the proceeding in the Supreme Court of the State of Tennessee appear in the caption of the case. The appellant, Paul Gregory House, will be herein referred to as "Petitioner" or by name. The appellee, State of Tennessee, will be herein referred to as "the State".

TABLE OF CONTENTS

	PAGE
Question Presented For Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Reference to Official and Unofficial Reports	v
Jurisdictional Statement	1
Constitutional Provisions and Statutes Involved	3
Statement of The Case	4
Argument	10
Conclusion	18
Appendix	19

TABLE OF AUTHORITIES

CASE AUTHORITIES CITED	PAGE
Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)	15
Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)	15
Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)	12
House v. State, Crim. No. 28, Union County, Slip op. (Tenn. Crim. App. Dec. 15, 1989)	5
In re Winship, 397 U.S. 357, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	15,16
Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, L.Ed.2d 384 (1988)	10,12,13
Presnell v. Georgia, 439 U.S. 14, 16, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978)	16
State v. House, 743 S.W.2d 141 (Tenn. 1987)	4,10
State v. Melton, 638 S.W.2d 342 (Tenn. 1982)	11
State v. Thompson, 768 S.W.2d 239 (Tenn. 1989)	11,13,14

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

1. State v. House, 743 S.W.2d 141 (Tenn. 1987)

2. House v. State, Crim. No. 28 Union County, Slip op. (Tenn. Crim. App. Dec. 15, 1989).

3. House v. State, Crim. No. 28 Union County, (Tenn. Mar. 5, 1990) (per curiam).

JURISDICTIONAL STATEMENT

The Petitioner seeks review of the judgment of the Tennessee Supreme Court, entered on March 5, 1990, denying his application for permission to appeal the judgment of the Tennessee Court of Criminal Appeals, entered on December 15, 1989, dismissing his Petition for Post-Conviction Relief.

By Order entered May 25, 1990, this Court granted the Petitioner an extension of time within which to file this Petition for Writ of Certiorari, said extension being granted to August 3, 1990.

The Petitioner expressly relies upon Rule 10.1(c) of the Revised Rules of the Supreme Court of the United States, which confers on this Court jurisdiction to review the judgment of the Tennessee Supreme Court by Writ of Certiorari. More particularly, said Rule provides:

> 1. A review on Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for Writ of Certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (c) When a state court or a United States Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court, or has decided a Federal question in a way that conflicts with applicable decisions of this Court.

The Petition also expressly relies upon 28 U.S.C. Section 1257(a) as conferring upon this Court jurisdiction to

review the judgment of the Tennessee Supreme Court by Writ of Certiorari. More particularly, said statute provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws in the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. 29 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XIII.
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

T.C.A. Section 39-2-203. Text set forth in Appendix 1.

T.C.A. Section 39-13-203. Text set forth in Appendix 1.

STATEMENT OF THE CASE

In a trial by jury held before the Criminal Court, Union County, Tennessee, Petitioner was convicted of First Degree Murder and sentenced to death. (Trial transcript, Volume XI, pages 1454-1456). At this trial, the Defendant objected to the sentencing instructions of the Judge during the death penalty stage. (Technical Record, Volume I, pp. 90-91). On direct appeal to the Tennessee Supreme Court, Petitioner's conviction and sentence were affirmed. State v. House, 743 S.W.2d 141 (Tenn. 1987).

On February 25, 1988, the Petitioner filed a pro se Petition for Post Conviction Relief. (Technical Record, Volume I, pp. 2-5). An Amended Petition was subsequently filed on August 22, 1988 (Technical Record, Volume I, pp. 15-16). A hearing on the Petition and Amended Petition was held by the Criminal Court, Union County, Tennessee, and by Order dated November 11, 1988, both the original Petition and the Amended Petition were overruled in their entirety. (Technical Record, Volume I, pp. 17-20). During this post conviction hearing at the Trial Court, the Petitioner raised the federal question that is the subject of this Petition for Writ of Certiorari. (Technical Record, Volume I, pp. 15-16). The Petitioner appealed the Trial Court's ruling to the Tennessee Court of Criminal Appeals, maintaining, as he has throughout this appeals process, that the Tennessee Capital Punishment Statute, T.C.A. Section 39-2-203, is constitutionally incompatible with the Eighth and Fourteenth Amendments to the United States

Constitution, in that, as explained by the Trial Court's instructions to the jury, the jury may have reasonably perceived that it could not give any effect to any mitigating circumstance or evidence unless all twelve (12) jurors first unanimously agreed on the existence of a particular mitigated circumstance. The Tennessee Court of Criminal Appeals dismissed Petitioner's Appeal on December 15, 1989. House v. State, Crim. No. 28, Union County, Slip op. (Tenn. Crim. App. Dec. 15, 1989). The Petitioner next sought review of this Judgment by the Tennessee Supreme Court, by way of an application for permission to Appeal, with said application being denied by Order entered on March 5, 1990. House v. State, Crim. No. 28, Union County, (Tenn. March 5, 1990) (per curiam). On March 16, 1990, an Order of Execution was sent down for May 23, 1990. Execution was stayed by Order of the Tennessee Supreme Court entered May 18, 1990. On May 23, 1990 the Petitioner applied for an extension of time in which to file this Petition for Writ of Certiorari and by Order entered May 25, 1990, this Court granted the Petitioner an extension of time within which to file this Petition for Writ of Certiorari, said extension being granted to August 3, 1990. Petitioner is presently incarcerated in the State Penitentiary in Nashville, Tennessee.

At the close of proof in the penalty phase of Petitioner's trial the Court instructed the jury as follows:

> "THE COURT: Ladies and gentlemen, you have reported that you have found the defendant guilty of murder in the first degree. The offense of murder in the first degree is punishable by death by electrocution or by imprisonment for life. Our statutory law provides that a jury shall fix the

punishment after a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment.

Your verdict must be unanimous as to either form of punishment. (emphasis added).

You have now heard all the evidence to be presented in the trial and the sentencing hearing of this case, including all of the evidence as to whether there was any aggravating circumstances and whether there was any mitigating circumstances, all of which you will carefully weigh and consider. No death penalty shall be imposed unless you find unanimously that one or more of the following specified statutory aggravating circumstances have been proven on trial and/or on the sentencing hearing and beyond a reasonable doubt.

1. The defendant was previously convicted of one or more felonies other than the present charge which involved the use of threat or violence to the person. In that connection, I will charge you that rape is the unlawful, carnal knowledge of a women forcefully and against her will. Carnal knowledge is accomplished by the commencement of the sexual connection and proof of emission is not required. Rape is a crime that involves the use or threat of violence to a person.

2. The murder was especially henious, atrocious or cruel and that it involved torture or depravity of mind. These words are defined as follows: Henious, grossly wicked or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful. Torture means the infliction of severe physical pains as a means of punishment or coercion. The experience of this mental anguish, any method or thing that causes such pain or anguish, to inflict with great physical or mental pain, depravity, moral corruption, wicked or perverse act.

Our statute provides that it is the murder which must be especially henious, atrocious or cruel. The words that involve torture or depravity of mind qualifies, limits and restricts the words especially henious, or atrocious, or cruel. Torture means the infliction of severe physical or mental pain upon any victim while the victim remains alive and conscious. Such torture involves the depravity of mind.

Depravity of mind may in some circumstances be shown, although torture as above referenced did not occur.

If acts occurring after the death of the victim are relied upon to show depravity of mind of the murderer, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature that the inference can be fairly drawn that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim. This is true because it is the murderer's state of mind at the time of the killing which must be shown to have been depraved.

3. The murder was committed while the defendant was engaged in committing or was attempting to commit or was fleeing after committing or attempting to commit rape or kidnapping.

Rape is the unlawful carnal knowledge of a woman, forcibly and against her will. Carnal knowledge is accomplished by the commencement of sexual connection and proof of emission is not required.

Kidnapping is the offence of forcibly or unlawfully confining, inveigling, enticing away another with the intent of causing him to be secretly confined or imprisoned against his will.

In arriving at the punishment, the jury shall consider as heretofore indicated (emphasis added) any mitigating circumstances which shall include but not be limited to, the following:

1. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

2. The youth of the defendant at the time of the crime.

The jury shall consider in assessment of punishment any mitigating factor or circumstances you deem or determine were raised by or existing from the evidence and such circumstances in mitigation include, but are not limited to, the mitigating factors and circumstances as set out above.

If the jury unanimously determines (emphasis added) that at least one statutory aggravated circumstance or several statutory circumstances have

been proved by the State, beyond a reasonable doubt, and said circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death.

If the death penalty is the decision of the jury, the members of the jury shall then complete the attached form entitled 'Punishment of Death'. The jury must include and reduce to writing the specific statutory aggravating circumstances so found.

Thirdly, the jury must include in its finding, that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

Upon such unanimous finding, (emphasis added), each member of the jury shall affix his or her signature to said written finding and then return the said written verdict to the Court.

If the jury unanimously determines that no statutory aggravating circumstance or aggravating circumstances have been proved by the State, beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or aggravating circumstances have been proven by the State, beyond a reasonable doubt, but that said circumstance or circumstances are outweighed by one or more mitigating circumstance, the punishment shall be life imprisonment.

The members of the jury shall then complete the attached form entitled 'Punishment of Life Imprisonment', by affixing their signatures thereto and returning the written verdict of the jury to the Court.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case, and an inability to let the mind rest easily as to the certainty of finding. You are the sole and exclusive judges of the credibility of witnesses and the weight to be given to the evidence presented.

You will be provided with two punishment forms. One entitled 'Punishment of Death', and the other entitled 'Punishment of Life'. You will complete the appropriate punishment form and each will sign it. The other punishment form is to be left incomplete and unsigned. These punishment forms read as follows:

Here is the first one: It says - Punishment of Death. We, the jury, unanimously find the following list of statutory aggravating circumstance or

circumstances. There is a note there, a direction. It says: from the limited list provided by the Court in these instructions, the jury must write and specifically list below as a part of its signed verdict the particular statutory aggravating circumstance or circumstances found by the jury. The statutory aggravating circumstances are listed on pages 2 and 3 of this charge. You write those in that place provided. The next page is the continuation of that form. It says: We, the jury, unanimously find that there are no mitigating circumstances (emphasis added) sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances as listed above.

We, the jury, unanimously find that the punishment for the defendant, and you will have to write his name in there, shall be death, and each of you will sign, the foreman will sign it first.

The next form, Punishment of Life Imprisonment. We, the jury, unanimously find that the punishment for the defendant, and you should write his name in there, will be life imprisonment. There is a place for the foreman to sign, and for each of you to sign.

You may now retire to the jury room for your deliberations and setting the punishment for the defendant.

You may take the charge with you."

Trial Transcript, Volume XI, pages 1446-1452.

ARGUMENT
A

Petitioner, for argument herein, relies in substantial part upon the holding and reasoning of this Court as set forth in Mills v. Maryland 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The Mills case was decided, June 6, 1988, approximately six (6) months after the Tennessee Supreme Court affirmed the Petitioner's sentence which is herein challenged. State v. House, 743 S.W.2d 141 (Tenn. 1987).

In Mills, supra, this Court held that if, in a sentencing phase of a capital trial, the jurors, upon receiving the Judge's instructions, could reasonably perceive from the instructions given that they were precluded from considering any mitigating evidence unless all twelve (12) jurors unanimously agreed on the existence of a particular mitigating circumstance, a death sentence returned by the jury would be constitutionally barred under the Eighth and Fourteenth Amendments to the United States Constitution.

The instructions given in Petitioner's trial, as above recited (pages 9-12) stressed unanimity, just as did the instructions in Mills. (Trial transcript, Volume XI, pp. 1446-1452).

In compelling language, the jurors at Petitioner's trial were initially charged by the Court that they shall "fix the punishment" at either death or life imprisonment. They were thereupon immediately instructed that their verdict "must be unanimous as to either form of punishment." (Trial transcript, Volume XI, page 1446).

The jurors unanimously found three (3) of the statutory aggravating circumstances to exist. (Trial transcript, Volume XI, pages 1454-1455). Accordingly, under the sentencing statute, (T.C.A. Section 39-2-203(g)), under case law interpretive of the statute, State v. Melton, 638 S.W.2d 342 (Tenn. 1982), and under the instructions as given to them by the Court, (Trial transcript, Volume XI, pages 1449-1450), it becomes necessary for the jury, in order to return a verdict other than death, to unanimously find that the aggravating circumstances already found by them, were outweighed by one or more mitigating circumstances. It is difficult to imagine that a jury could make such a unanimous finding without first unanimously finding the existence of some particular mitigating circumstance to weigh, or, put in other words, that some particular facts in evidence were mitigating.

Based principally upon the holding of the Tennessee Supreme Court in State v. Thompson, 768 S.W.2d 239 (Tenn. 1989), the Tennessee Court of Criminal Appeals reasoned that since the instructions given by the Trial Court did not expressly require the jury to agree unanimously upon the existence of mitigating circumstances, the instructions did not violate the Eighth Amendment of the United States Constitution. This reasoning overlooks a significant distinction between the instructions given in the instant case and those given in Thompson. In Thompson, the Trial Court, in its instructions, emphasized the autonomy of individual jurors in considering mitigating evidence. See Thompson, 768 S.W.2d at 251. No such guidance was

given in the instant case. The issue is not whether the instructions as given actually require unanimity among the jurors in finding the existence of a particular mitigating circumstance, but whether an individual juror or jurors might reasonably have perceived such a requirement from the instructions given. Mills v. Maryland, 486 U.S. 367 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

Given the compelling nature of the Court's charge and its emphasis upon unanimity, it is clear that an individual juror or any number of jurors might perceive they were precluded from considering or giving weight to any mitigating evidence unless all twelve (12) jurors agreed on the existence of a particular mitigating circumstance.

So perceived, what if, as is postulated in the Mills case, supra, page 1865, "eleven (11) of the jurors agree that there are six (6) mitigating circumstances"? The result is that there is no mitigating circumstance found. Consequently, there is nothing to weigh against any aggravating circumstances found and the judgment is death.

To meet constitutional muster, jury discretion must be guided by appropriate objective standards. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Those standards in a capital case are extremely high. Mills, supra, page 1870. That guidance can only be given in the Court's instructions. Clearly, appropriate guidance was not provided by the instructions given by the Court at Petitioner's trial. Despite the mandate of the sentencing statute requiring that the

Trial Judge instruct the jury in the manner or deliberative process to be used in arriving at their verdict, no instruction was given indicating what the jury should do if some, but not all, were willing to recognize something as a mitigating factor as required in Mills. Mills, supra, page 1868. No instruction was given as to what the jury should do if it did not unanimously reject all mitigating circumstances and, further, no instructions given that each individual juror should weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found by that individual juror to exist. Finally, the Court gave no instruction as to what the juror should do if they were unable to unanimously reach agreement as to the punishment in either form.

From the above it is clear that the trial court's instructions are constitutionally incompatible with the Eighth and Fourteenth Amendments to the United States Constitution, as applied by Mills.

B

The Tennessee Capital Punishment Statute, T.C.A. Section 39-2-203, as explained by the trial court's instructions, is constitutionally incompatible with the Eighth and Fourteenth Amendments to the United States Constitution in that it does not assign any standard for weighing or balancing mitigating circumstances against aggravating circumstances, nor does it assign either side the burden of proof in respect to which outweighs the other. In State v. Thompson, 768 S.W.2d 239 (Tenn. 1989), the Tennessee Supreme Court ruled that the Statute in

question was constitutionally sound due to the fact that it did not operate to preclude consideration of any relevant mitigating factors. Assuming arguendo, the correctness of such a ruling, the Court itself ruled the Statute unconstitutional when it immediately followed the above holding by saying, in respect to the Statute, "nor does it assign any standard for weighing mitigation against the aggravating circumstances." Thompson, supra, at 251.

After the jury makes the threshold determination as to the existence of aggravating and mitigating circumstances, it is then left standardless in making the crucial determination as to which outweighs the other. This problem is exacerbated by the fact the jury did not specify its findings as to the existence of any mitigating factors in its verdict of death, it need only report which aggravating factors it has found, and that there is no mitigation sufficiently substantial to outweigh aggravation.

Clearly, under the statute in effect at the time of the sentence, the State had the burden of proving any aggravating circumstance beyond a reasonable doubt. T.C.A. Section 39-2-203(f), (g). It was equally clear that the defendant had the burden of proving mitigating factors. But, after each side has carried their respective burden, the statute then gave no guidance as to who had the burden of proving which outweighed the other. Surely the due process clause of the Fourteenth Amendment requires the State to prove this aspect of this case beyond a reasonable doubt.

Fourteenth Amendment Due Process Rights govern the

burdens and standards of proof in criminal proceedings, In re Winship, 397 U.S. 357, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and apply to the sentencing phase, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Whether mitigation outweighs aggravation is an essential element for imposition of the death penalty. Yet as to this element, the statute fails to specify both the extent of the burden of proof and who carried it. This failure violates the due process rights explicated in Winship and Gardner, and allows the jury the type of unfettered discretion condemned in Furmin v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The standard of proof beyond a reasonable doubt is fundamental to the concept of due process in a criminal case.

> The demand for a higher degree of persuasion in criminal cases as recurrently expressed from the ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is accepted in common law jurisdiction as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt...
>
> Less there remain any doubt about the constitutional statute with the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, supra, at 364.

Winship clearly articulated the reasons for application of the reasonable doubt standard in criminal cases:

> The reasonable doubt standard plays a vital role in the American Scheme of Criminal Procedure. It is a prime instrument for reducing the risk of convictions resting on factual error...
>
> There is always in litigation a margin of error, representing error in fact finding, which both parties

must take into account. Where one party has its stake in interest of transcending valve, as a criminal defendant his liberty, this margin of error is reduced as to him by the process of placing on the other party the burden of...persuading the fact finder...of his guilt beyond a reasonable doubt...

Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. Winship, supra, at 363.

Although Winship addressed the determination of whether a juvenile defendant was guilty of a delinquent offense, the same standards apply to the sentencing phase of a death penalty case. "These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt determining phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14, 16, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). Further, as noted in Winship, the requirements that the State meet the reasonable doubt standard of proof "is implicit in 'constitutions...[which] recognized the fundamental principles that are deemed essential for the protection of life and liberty." Winship, supra at 362. The Winship reasoning compels use of the reasonable doubt standard in determining whether death is the appropriate sentence. The defendant's life hangs upon a factual finding by the jury that the aggravating circumstances outweigh the mitigating circumstances. The defendant thus has a paramount interest, that being life, at stake. Given the inheritently subjective nature of weighing circumstances and the significance of the defendant's interest, the margin for error should be reduced by placing upon

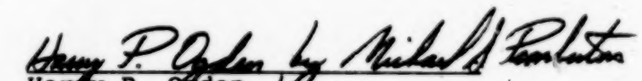
the State the burden of proof beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances.

The Tennessee Legislature apparently recognized the problem and enacted a new statute, T.C.A. Section 39-13-203, which differs from the old statute, T.C.A. Section 39-2-203, in that the State is now required to prove that any aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt. If the State fails to carry this burden, then the sentence shall be life imprisonment. T.C.A. Section 34-13-203(f).

CONCLUSION

For the above mentioned reasons, it is clear that this Court should grant certiorari to consider the constitutionality of the Tennessee Death Penalty Statute in effect at the time of the Petitioner's sentence.

Respectfully Submitted,



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APPENDIX

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED
MAR 5 1990
ROBERT W. SUMMAR, CLERK
By _____

PAUL GREGORY HOUSE,
APPELLANT

VS.

STATE OF TENNESSEE
APPELLEE

UNION COUNTY
CCA NO. 28
(POST CONVICTION)

O R D E R

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of Paul Gregory House is denied at cost of the appellant.

PER CURIAM

In the Court of Criminal Appeals of Tennessee, at Knoxville

PAUL GREGORY HOUSE
Appellant-Petitioner

VS.

STATE OF TENNESSEE
Appellee

CCA NO. 28
Union County
No. 502 Below
Offense:
Post-Conviction

AFFIRMED

FILED
DEC 15 1989
ROBERT W. SUMMAR, CLERK
By _____

Judgment

Came the Appellant, Paul Gregory House

by counsel, and also came the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Union County; and upon consideration thereof, this Court is of the opinion that there is no reversible error on the record and that the judgment of the trial court should be affirmed.

In accordance with the Opinion filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of Union County for the execution of the judgment of that Court and for the collection of the costs accrued below.

Costs of appeal will be paid into this Court by the Appellant, Paul Gregory House for which let execution issue.

JOE D. DUNCAN, JUDGE
JOHN K. BYERS, JUDGE
GARY R. WADE, JUDGE

Certification

Office of Clerk of Court of Criminal Appeals
for the Eastern Division of the State of Tennessee:

I, Robert W. Summar, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Judgment *of said Court, pronounced on* December 15 *19* 89 *in the case of* PAUL GREGORY HOUSE *against* STATE OF TENNESSEE *as appears of record now on file in my office.*

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 15th *day of* December *19* 89

Robert W. Summar, Clerk

By Carolyn Williams D.C.

FILED
DEC 15 1989
CLERK W. CONNAR, C.M.S.
B/

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

KNOXVILLE, SEPTEMBER SESSION, 1989

PAUL GREGORY HOUSE,	)	
	)	
Appellant-Petitioner	)	C.C.A. No. 28
	)	
	)	Union County
v.	)	
	)	Honorable James Witt, Special Judge
STATE OF TENNESSEE,	)	
	)	(Post-Conviction)
Appellee	)	

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OPINION FILED: DEC 15 1989

AFFIRMED

Joe D. Duncan
Presiding Judge

O P I N I O N

The petitioner, Paul Gregory House, was convicted of murder in the first degree and sentenced to death by electrocution. His conviction and sentence were affirmed on direct appeal. State v. House, 743 S.W.2d 141 (Tenn. 1987).

On February 25, 1988, the petitioner filed a pro se petition for post-conviction relief. Counsel who was appointed to represent him filed an amended petition. In the pro se petition, the petitioner alleged that he was deprived of the effective assistance of counsel in his original trial proceedings. In the amended petition, among other issues raised, the petitioner challenged the constitutionality of certain jury instructions given at his sentencing hearing.

On August 22, 1988, the trial court conducted a hearing at which the petitioner chose to proceed without offering proof and relied upon the transcript of his original trial proceedings.

On November 11, 1988, the trial court entered an order dismissing the petition for post-conviction relief, specifically finding that the petitioner had received effective assistance from his original trial counsel. On November 23, 1988, the trial court entered a supplemental order overruling the allegations raised in the amended petition.

In this appeal, the petitioner complains only about certain jury instructions that were given at his sentencing hearing. Specifically, the petitioner contends in his brief that the Tennessee capital punishment statute, T.C.A. §39-2-203 (1982), is constitutionally incompatible with the eighth and

fourteenth amendments of the United States Constitution, because from the trial court's jury instructions, "the jury may have reasonably perceived that it could not give any effect to any mitigating evidence unless all twelve jurors first agreed on the existence of a particular mitigating circumstance."

We find no merit to this issue.

The record shows that at the petitioner's sentencing hearing, the trial court charged the jury, as follows:

> "THE COURT: Ladies and gentlemen, you have reported you have found the defendant guilty of murder in the first degree. The offense of murder in the first degree is punishable by death by electrocution or by imprisonment for life. Our statutory law provides that the jury shall fix the punishment after a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment.
>
> Your verdict must be unanimous as to either form of punishment.
>
> You have now heard all the evidence to be presented in the trial and the sentencing hearing of this case, including all of the evidence as to whether there was any aggravating circumstances and whether there was any mitigating circumstances, all of which you will carefully weigh and consider. No death penalty shall be imposed unless you find unanimously that one or more of the following specified statutory aggravating circumstances have been proven on trial and/or on the sentencing hearing and beyond a reasonable doubt.
>
> 1. The defendant was previously convicted of one or more felonies other than the present charge which involved the use of threat or violence to the person. In that connection, I will charge you that rape is the unlawful, carnal knowledge of a woman forcefully and against her will. Carnal knowledge is accomplished by the commencement of the sexual connection and proof of emission is not required. Rape is a crime that involves the use of threat of violence to a person.
>
> 2. The murder was especially heinous, atrocious or cruel and that it involved torture or depravity of mind. These words are defined as follows: Heinous, grossly wicked or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful. Torture means the infliction of severe physical pain as a means of punishment or coercion. The experience of this mental anguish, any method or

> thing that causes such pain or anguish, to inflict with great physical or mental pain, depravity, moral corruption, wicked or perverse act.
>
> Our statute provides that it is the murder which must be especially heinous, atrocious or cruel. The words that involve torture or depravity of mind qualifies, limits and restricts the words especially heinous, or atrocious, or cruel. Torture means the infliction of severe physical or mental pain upon any victim while the victim remains alive and conscious. Such torture involves the depravity of mind.
>
> Depravity of mind may in some circumstances be shown, although torture as above referenced did not occur.
>
> If acts occurring after the death of the victim are relied upon to show depravity of mind of the murderer, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature that the inference can be fairly drawn that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim. This is true because it is the murderer's state of mind at the time of the killing which must be shown to have been depraved.
>
> 3. The murder was committed while the defendant was engaged in committing or was attempting to commit or was fleeing after committing or attempting to commit rape or kidnapping.
>
> Rape is the unlawful carnal knowledge of a woman, forcibly and against her will. Carnal knowledge is accomplished by the commencement of sexual connection and proof of emission is not required.
>
> Kidnapping is the offense of forcibly or unlawfully confining, inveigling, enticing away another with the intent of causing him to be secretly confined or imprisoned against his will.
>
> In arriving at the punishment, the jury shall consider as heretofore indicated any mitigating circumstances which shall include but not be limited to, the following:
>
> 1. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> 2. The youth of the defendant at the time of the crime.
>
> The jury shall consider in assessment of punishment any mitigating factor or circumstances you deem or determine were raised by or existing from the evidence and such circumstances in mitigation include, but are not limited to, the mitigating factors and circumstances as set out above.
>
> If the jury unanimously determines that at least one statutory aggravated circumstance or several statutory circumstances have been proved by the State,

beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death.

If the death penalty is the decision of the jury, the members of the jury shall then complete the attached form entitled "Punishment of Death." The jury must include and reduce to writing the specific statutory aggravating circumstance or aggravating circumstances so found.

Thirdly, the jury must include in its finding, that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

Upon such unanimous finding, each member of the jury shall affix his or her signature to said written findings and then return the said written verdict to the Court.

If the jury unanimously determines that no statutory aggravating circumstance or aggravating circumstances have been proved by the State, beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or aggravating circumstances have been proved by the State, beyond a reasonable doubt, but that said circumstance or circumstances are outweighed by one or more mitigating circumstance, the punishment shall be life imprisonment.

The members of the jury shall then complete the attached form entitled "Punishment of Life Imprisonment," by affixing their signatures thereto and returning the written verdict of the jury to the Court.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case, and an inability to let the mind rest easily as to the certainty of finding. You are the sole and exclusive judges of the credibility of witnesses and the weight to be given to the evidence presented.

You will be provided with two punishment forms. One entitled "Punishment of Death," and the other entitled "Punishment of Life." You will complete the appropriate punishment form and each will sign it. The other punishment form is to be left incomplete and unsigned. These punishment forms read as follows:

Here is the first one: It says - Punishment of Death. We, the jury, unanimously find the following list of statutory aggravating circumstance or circumstances. There is a note there, a direction. It says: From the limited list provided by the Court in these instructions, the jury must write and specifically list below as a part of its signed verdict the particular statutory aggravating circumstance or circumstances found by the jury. The statutory aggravating circumstances are listed on pages 2 and 3 of this charge. You write those in that place provided. The next page is the continuation of that form.

It says: We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances as listed above.

We, the jury unanimously find that the punishment for the defendant, and you will have to write his name in there, shall be death, and each of you shall sign, the foreman will sign it first.

The next form, Punishment of Life Imprisonment. We, the jury, unanimously find that the punishment for the defendant, and you would write his name in there, will be life imprisonment. There is a place for the foreman to sign, and for each of you to sign.

You may now retire to the jury room for your deliberations and setting the punishment for the defendant.

You may take the charge with you.

It is readily apparent that the above sentencing instructions parallel the language and structure of T.C.A. §39-2-203 (1982). They also conform to the Tennessee Pattern Jury Instructions. T.P.I.--Crim. §20.03 (1st ed. 1978).

In State v. Thompson, 768 S.W.2d 239 (Tenn. 1989), our Supreme Court dealt with practically the same jury instructions as are contested in the present case. The Court held that these sentencing instructions, which parallel the language and structure of the statute, do not require the jury to agree unanimously on existence of mitigating circumstances, so as to preclude individual jurors from considering evidence they might deem mitigating in the ultimate determination.

In Thompson, the Tennessee Supreme Court distinguished Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), which held that an instruction which requires unanimity on mitigating circumstances violates the eighth amendment of the United States Constitution.

In Mills, the jury returned a sentence of death by returning findings upon a form which listed the various

aggravating and mitigating circumstances. The form required the jury to find unanimously that each mitigating circumstance which had been marked "yes" had been proven to exist by preponderance of the evidence and that each circumstance marked "no" had not been proven by a preponderance of the evidence. Id. 108 S.Ct. at 1871.

In both Thompson and the present case, the jury was not required to list or vote upon the specific mitigating factors. The instructions required unanimity only when the jury found special aggravating circumstances. Under these instructions, the jury was required to determine beyond a reasonable doubt each of the aggravating circumstances, and having done this, then each juror "had discretion to determine the degree to which the proof" mitigated against the death penalty, and whether it was "sufficiently substantial to call for a lesser sentence." See Thompson, 768 S.W.2d at 252.

Since the instructions given in the present case did not require unanimity on mitigating circumstances, and since the instructions did not operate to preclude any juror from considering mitigating evidence which he or she deemed relevant, the instructions satisfied the eighth amendment.

We find no merit to this issue.

The trial court correctly dismissed the petitioner's post-conviction relief petition. The judgment is affirmed.

Joe D. Duncan, Presiding Judge

CONCUR:

John K. Byers, Judge

Gary R. Wade, Judge

743 S.W.2d 141 (Tenn. 1987)

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IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE, Appellee, vs. PAUL GREGORY HOUSE, Appellant.	)	For Publication December 14, 1987 Union Criminal Hon. James C. Witt, Judge S. Ct. No. 2

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OPINION

AFFIRMED.

HARBISON, C.J.

Appellant was convicted of murder in the first degree and sentenced to death by electrocution. After review of the entire record and after considering all of the issues raised by counsel for appellant, we affirm the conviction and the sentence.

The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. Mrs. Muncey was in her late twenties, and her children were about eight and ten years old at the time of her death on July 13, 1985.

In March 1985 appellant Paul Gregory House was released from prison in Utah and moved to the rural community in which the Muncey family lived. There he resided with his mother and step-father for several weeks, but in June he moved into a trailer occupied by his girl friend, Donna Turner, which was located about two miles from the Muncey home. Appellant did not own an automobile; but he was permitted to drive his mother's car from time to time, and he also drove Ms. Turner's car on some occasions.

Other than doing occasional farm work for his stepfather, appellant does not appear to have been regularly employed. He did not testify at trial at either the guilt phase or the sentencing hearing. He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that

state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.

Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home.

Apparently the husband of the victim was not at home during the early part of the evening of July 13. Mrs. Muncey and her children visited a neighbor and left at about 9:30 p.m. to return to their home. Later the older child, Laura, awoke. She testified that she heard a voice which sounded like her grandfather making inquiry about her father. She also heard someone tell her mother that her father had been in a wreck near the creek. She heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and waited until their father arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor where they had visited earlier in the evening and then called for members of his family to look for his wife.

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there

were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one to two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. Through defense proof there was testimony that Mrs. Muncey and her husband had been having marital difficulties and that she had been contemplating leaving him. There was no evidence to indicate that the appellant was aware of that situation, however, or that there had been any previous romantic or sexual relationship between him and the victim.

On the afternoon of Sunday, July 14, 1985, two witnesses saw the appellant emerge from a creek bank at the side of Ridgecrest Road at the site where Mrs. Muncey's body was later found concealed in the underbrush. He was wiping his hands with a dark cloth and was walking toward a white Plymouth automobile, parked on the opposite side of the road, belonging to his girl friend Donna Turner. The two witnesses

spoke briefly to appellant, all of them discussing the fact that Mrs. Muncey had disappeared. Later the two witnesses became suspicious of what they had observed and returned to the point where they had seen appellant emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey. They promptly notified the sheriff.

Appellant later admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. The dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark "tank top" or jersey which appellant was shown to have been wearing on the previous evening, July 13.

Appellant gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at Ms. Turner's trailer the entire evening of July 13 and that he had not left until the next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife.

On Sunday afternoon various witness observed that appellant had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. Appellant explained that these injuries had been sustained innocently earlier during the week, but when Mrs. Turner was called as a

witness, she said that she had not observed them prior to the evening of July 13. Appellant also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Mrs. Turner's trailer. These trousers were bloodstained, and scientific evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with appellant's own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

Some of the most damaging evidence against appellant was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing either his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where appellant told her he had lost them.

Appellant told Ms. Turner that he had thrown away

the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after the appellant's return to the trailer that Mrs. Turner first noticed the bruises and abrasions on his hands referred to previously.

Appellant's mother testified that he had not used her automobile on Saturday evening. She testified that during Saturday and Sunday she had been planning to separate from appellant's stepfather and that appellant had been assisting her in her preparations for moving.

At the sentencing hearing the State proved appellant's prior conviction for aggravated sexual assault. Appellant's parents testified that he came from a broken home and had been subjected to stress as a result of that experience. Appellant's mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

Although the evidence against appellant was circumstantial, it was quite strong. Particularly incriminating was the testimony that he had emerged from an embankment where the body was found, wiping his hands on a dark cloth,

without disclosing to anyone the presence of the body. Damaging also were the discovery of his bloodstained trousers and the testimony of Mrs. Turner, which a trier of fact could have found sufficient to demolish his alibi and to demonstrate that he had been in a heavy struggle near the time when the homicide must have occurred.[1] A classic case for determination by a jury was presented, and the evidence clearly is sufficient to support the conviction.

Following the sentencing hearing, the jury imposed the death penalty. In their verdict they found that the State had established three aggravating circumstances, these being: (1) appellant had previously been convicted of a felony involving the use or threat of violence to the person; (2) the homicide was especially heinous, atrocious, or cruel; and (3) it was committed while appellant was committing or attempting to commit or fleeing from the commission of rape or kidnapping. T.C.A. § 39-2-203(i)(2), (5), and (7).

There was ample evidence to support all of these findings and to support the conclusion of the jury that no mitigating circumstances had been established which would outweigh the aggravating circumstances. Certainly the sentence of death was not disproportionate to that imposed in other cases in view of the violent and brutal nature of the

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1 After returning from his "walk," appellant suggested marriage to Ms. Turner for the first time in their relationship. It was at least arguable that he thought by this means her testimony could be rendered inadmissible by the husband-wife privilege.

homicide shown in this record.

Counsel for appellant has raised a number of legal issues, all of which we have considered but do not find sufficient to warrant a reversal of the conviction or the sentence. A broad attack has been made upon the constitutionality of the Tennessee death penalty statutes, but practically all of the issues raised by counsel have been previously considered and rejected by this Court in extensive reported opinions. We do not deem it necessary here to repeat citations dealing with these constitutional issues. Appellant insists that T.C.A § 39-2-203(d) permits the State to make final closing argument to the jury in the penalty phase, and therefore, deprives the accused of due process of law and the effective assistance of counsel. We find no merit in this contention, especially in view of our repeated holdings that the burden of proof to establish aggravating circumstances beyond a reasonable doubt rests upon the State.

Counsel for appellant also questions the excusing of four prospective jurors upon challenge for cause made by the State. Each of these persons stated that he or she could not consider the imposition of the death penalty under any circumstances. We find no error in their being excused. See Witherspoon v. Illinois, 391 U.S. 510 (1968); State v. Harrington, 627 S.W.2d 345 (Tenn. 1981).

One of the issues most seriously pursued on appeal is the alleged failure of the State properly to allow appellant to test certain evidence prior to trial. Alternatively

it is argued that the trial judge should have suppressed the state's evidence concerning the bloodstains on appellant's trousers.

The blue jeans on which bloodstains were found were discovered in the trailer of Ms. Turner on Monday, July 15, 1985. On July 17, they were transported to the F.B.I. Laboratory in Washington for blood comparison analysis, together with a sample of blood drawn from the body of the victim. On that same date an F.B.I. agent informed Union County law enforcement officials that initial tests showed that the bloodstains on the blue jeans were of human origin. Appellant was not arrested until that information had been given to local authorities.

As a part of the testing of the blue jeans, portions of them were cut out and destroyed. On July 26, 1985, defense counsel filed a motion in the General Sessions Court for samples of specimens of any physical evidence on which the State or its agents performed any scientific tests and requested notice of any destructive testing. When a preliminary hearing was held on August 9, the State acknowledged receipt of this motion and stated that some of the tests would consume parts of the trousers. Although one F.B.I. agent testified that he had no further need for the blue jeans themselves after July 17, further tests were performed by other persons on other materials sent to the laboratory. Blood samples from appellant were taken on July 18 and sent to the F.B.I. The F.B.I did not return the blue jeans and other evidence submitted to it until some time in September

1985. During that time the blue jeans had been held by the F.B.I. under refrigeration to prevent deterioration of blood stains as much as possible.

Defense counsel was notified early in October that the trousers were available for examination or testing by an independent expert of his selection. The defense did not arrange to take them from the custody of the State, however, until October 29. Some tests were attempted on October 31, and others were made about a week later. An expert witness for the defense stated that blood stains remaining on the blue jeans had deteriorated by that time so that he was not able to make any meaningful independent tests.[2] It appears, however, that this expert had kept the trousers unrefrigerated, in a file drawer, for some period of time before undertaking some of his tests.

It does not appear that the State deliberately withheld the trousers from inspection or testing by the defense. No serious question has been raised concerning the reliability of the tests conducted by the F.B.I. or of the results thereof. There is no more than a suggestion that independent tests might have been significant. All witnesses agreed that the chemistry of blood specimens on clothing

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2 The expert admitted that he could still have tested the stains to determine whether they consisted of human blood or animal blood. Obviously there was no way for him to compare the stains with blood of the victim since she had died, and the only vial of her blood available was used by the F.B.I. before appellant was even arrested. At no time has it been contended that the stains were appellant's own blood.

changes with the passage of time, and no question has been made but that it was necessary for the F.B.I. agents to take specimens of the trousers themselves and to cut them out in order to conduct the tests which initially led to the arrest of the appellant.

Rule 16(a)(1)(C), Tennessee Rules of Criminal Procedure, provides:

> "Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of his defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant."

The record does not disclose any refusal by the State to provide its test results to the defense or to make the trousers themselves available for testing. Reasonable steps were taken to preserve the material.

At the time of appellant's initial request on July 26, 1985, there had not even been a preliminary hearing. The matter was then raised at the preliminary hearing itself, following which appellant was indicted on September 23. The materials were made available to appellant for further testing within a reasonable time after the return of the indictment. Under the circumstances we find no reversible error in the refusal of the trial judge to suppress the evidence of the blood tests conducted by the F.B.I. or in the

failure of the State to make the materials available to appellant at an earlier date.

In the case of State v. Gaddis, 530 S.W.2d 64 (Tenn. 1975), this Court held that an accused may be entitled to a sample of a controlled substance to have an independent analysis made by his own expert. The same rule applies under the Rules of Criminal Procedure which were subsequently adopted.

Although the Gaddis case only involved controlled substances, the principles announced therein and followed in the Rules of Criminal Procedure are not necessarily limited to that particular type of case. See Smith v. State, 566 S.W.2d 553, 559 (Tenn. Crim. App. 1978).

Until the accused in this case had been indicted, on September 23, 1985, it would have been difficult and almost impracticable for the judge of the court in which the case was tried to have dealt with this matter. There is no showing of deliberate delay by the State or the F.B.I. prior to that time, and the matter was handled with reasonable dispatch after the indictment was returned. The record is conjectural at best as to whether any significant independent test could have been performed after the indictment was returned. In the absence of evidence of deliberate obstruction or delay by the State prior to that time, we are of the opinion that the trial court was correct in not suppressing the evidence offered by the State of the results which were conducted on its behalf.

It should be noted that at least a part of the elapsed time involved was attributable as much to the defense or its expert as to the State. The issue in this case is not one of obliteration or destruction of the only available sample, but merely one of delay in delivering the remaining sample to the accused. The record indicates that there were ample stains remaining on the trousers after the F.B.I. had conducted its tests but, as stated previously, it is entirely a matter of speculation as to when the remaining samples had undergone sufficient chemical change by passage of time to render impracticable certain specified tests concerning enzymes sought by the defense. As previously stated, some types of tests could have been performed, but appellant's expert chose not to pursue them.

Cases from other jurisdictions have reached differing conclusions regarding the destruction or consumption of blood samples and other types of evidence. Suppression of the State's evidence is a drastic remedy, usually imposed only where the State has clearly suppressed or destroyed evidence known to be favorable to the accused or has displayed bad faith or deliberate misconduct in not furnishing samples to the defense. See generally, Annot., 40 A.L.R. 4th 594, 612-616 (1985); see also, State v. James, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984).

Appellant insists that in closing argument in the guilt phase of the trial the District Attorney improperly commented upon the fact that the appellant did not testify in his own behalf. Our examination of the arguments reveals

that the State did no more than emphasize that its evidence concerning the presence of incriminating bloodstains on the trousers of appellant was not contradicted or explained. Not only was there an absence of any objection to this argument, but it also clearly appears that the comments were made in response to arguments advanced by counsel for appellant. The issue is without merit. See Schweizer v. State, 217 Tenn. 569, 399 S.W.2d 743 (1966); State v. Coury, 697 S.W.2d 373 (Tenn. Crim. App. 1985).

In his next issue counsel for appellant contends that the jury instructions with respect to malice at the guilt trial improperly shifted the burden of proof to the defense, contrary to Sandstrom v. Montana, 442 U.S. 510 (1979) and Francis v. Franklin, 471 U.S. 307 (1985). We have examined the charge, in which the word "presumption" was omitted and the word "inferred" was substituted. As thus revised, as suggested by this Court in State v. Bolin, 678 S.W.2d 40 (Tenn. 1984), the charge was not susceptible, in our opinion, to any understanding or construction that the burden of proof on the issue of malice was shifted to the accused. Further, with respect to this element of the crime, any error in the instruction would clearly have been harmless beyond a reasonable doubt in view of the brutality and heinousness with which the homicide was accompanied.

Appellant assigns as error the refusal of the trial court to suppress the statements which he made in response to interrogation on July 14 and 15, 1985. A full suppression hearing was conducted. This revealed that the accused was

not in custody when either of the statements was made. Both were taken before he was formally arrested or charged and at a time when he was only one of several persons being interrogated generally about the circumstances of the offense. On neither occasion was the accused restrained, and on both occasions he was advised that he was not under arrest but was free to leave and was not required to make any statements. Appellant did not testify at the suppression hearing and offered no evidence to contradict the testimony of the State's witnesses.

It was not until July 17, two days after the second statement, when the results of the F.B.I. tests on his trousers were received, that appellant was arrested and charged in this case.

The record supports the conclusion of the trial judge in overruling the motion to suppress.

In proving the prior conviction of the appellant at the sentencing hearing, the State adduced evidence as to the extent of his sentence and the fact that he was on parole. The State concedes that this testimony was irrelevant to any statutory aggravating circumstance or to any mitigating factor and that error was, therefore, committed. Under all of the circumstances, however, in our opinion the error was harmless beyond a reasonable doubt. As previously stated, three aggravating circumstances were shown, and there was almost minimal proof of any mitigating factor, so that any error with respect to this issue, in our opinion, could not

have affirmatively affected the results of the hearing. This is especially true in view of the fact that the State did not make any reference in the closing argument to the length of appellant's prior sentence or to his parole status.

Counsel for appellant insists that the trial court improperly permitted the jury to consider evidence adduced at the guilt phase of the trial in considering their sentence since the State made no formal motion to adopt that evidence. Statutory provisions, however, mandate that the jury be instructed at the sentencing hearing to consider any evidence which may have been adduced at either the guilt or the sentencing hearing. T.C.A. § 39-2-203(d). The issue is without merit.

Also without merit is the contention that the State failed to give proper notice to counsel for appellant of its intention to seek the death penalty and of the aggravating circumstances upon which it would rely.

Appellant insists that there was an improper separation of the jurors before the sentencing hearing which entitles him to a new trial.

The record shows that after the guilt phase of the trial had been concluded, an overnight adjournment ensued. During the evening hours three female members of the jury were seen, accompanied by a court officer, at a lounge where two of them ordered beer or a mixed drink. The officer who had the jurors in her custody testified that the three jurors

remained in the lounge for less than thirty minutes and that only two of them consumed any alcoholic beverages. There was no discussion of the trial or its incidents, nor was any contact made with the jurors by any third person.

The sentencing hearing was held on the day following this incident. None of the jurors testified, nor were affidavits offered in evidence from them or from other persons at the motion for a new trial in support of this issue.

Moderate use of alcoholic beverages by jurors during a trial, which is not shown to be excessive or to affect the verdict, does not require a new trial. See Sherman v. State, 125 Tenn. 19, 140 S.W. 209 (1911). The testimony of the jury officer overcame any presumption of prejudice from the separation of the jurors in this case, assuming that an improper separation of the jurors could be said to have occurred. See Gonzales v. State, 593 S.W.2d 288 (Tenn. 1980). This itself is doubtful in view of the fact that the jurors were never out of the presence of officers sworn to guard them. See Steadman v. State, 199 Tenn. 66, 282 S.W.2d 777 (1955).

We have carefully examined all of the other issues raised by the appellant and find none of them sufficient to justify reversal of the conviction or the sentence. The sentence will be carried out as provided by law on the 7th day of March, 1988, unless otherwise ordered by this Court or by other proper authority.

William J. Harbison
William J. Harbison
Chief Justice

Fones, Cooper, Drowota and O'Brien, JJ., concur.

39-2-203. Sentencing for first-degree murder. — (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or

circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/_____ Jury Foreman
/s/_____ Juror
/s/_____ Juror
/s/_____ Juror
/s/_____ Juror
/s/_____ Juror

/s/_____ Juror
/s/_____ Juror
/s/_____ Juror
/s/_____ Juror
/s/_____ Juror
/s/_____ Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall:

(1) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(2) Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/_____ Jury Foreman
/s/_____ Juror

s/ _____ Juror
s/ _____ Juror
s/ _____ Juror
s/ _____ Juror
s/ _____ Juror
s/ _____ Juror
s/ _____ Juror
s/ _____ Juror
s/ _____ Juror
s/ _____ Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder;

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement;

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties;

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office;

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official; and

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empaneled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first-degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment. [Code 1858, § 4600 (deriv. Acts 1829, ch. 23, § 3); Shan., § 6441; Code 1932, § 10770; Acts 1977, ch. 51, § 2; 1981, ch. 33, § 1; T.C.A. (orig. ed.), § 39-2404.]

Section to Section References. This section is referred to in § 40-35-201.

Law Reviews. Criminal Law in Tennessee in 1979 — A Critical Survey, III. Procedure (Joseph G. Cook), 48 Tenn. L. Rev. 19.

[

39-13-203. Sentencing for first degree murder [Effective November 1, 1989]. — (a) Upon a trial for first degree murder, should the jury find the defendant guilty of first degree murder, it shall not fix punishment as part of the verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement; provided, that the waiver of opening statement by one (1) party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of

punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in the instructions for the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i) which may be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall also include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both which shall include, but not be limited to, those circumstances set forth in subsection (j). No distinction shall be made between mitigating circumstances as set forth in subsection (j) and those otherwise raised by the evidence which are specifically requested by either the state or the defense to be instructed to the jury. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proven by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/ _____ Jury Foreman	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror

(g) If the jury unanimously determines that: (i) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances

have been proven by the state beyond a reasonable doubt, and (ii) such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall:

(1) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(2) Signify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found.]

We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/ _____ Jury Foreman	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which are limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person;

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;

(4) The defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

(8) The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement;

(9) The murder was committed against any law enforcement officer, corrections official, corrections employee or fireman, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that such victim was a law enforcement officer, corrections official, corrections employee or fireman engaged in the performance of official duties;

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied such office;

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official; or

(12) The defendant committed "mass murder" which is defined as the murder of three (3) or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment; and

(9) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for such purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, the new trial shall include the possible punishments of death or life imprisonment. [Acts 1989, ch. 591, § 1.]

Sentencing Commission Comments. This section closely parallels prior law. One change is subsection (f), which now requires that the jury must unanimously determine that a statutory aggravating circumstance or circumstances outweigh a mitigating circumstance or circumstances beyond a reasonable doubt in order to impose the death sentence. See State v. Hartman, 703 S.W.2d 106 (Tenn. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3308, 92 L.Ed.2nd 721 (1986). An additional modification, which is constitutionally required, is the language appearing at the end of subsection (j), providing that the mitigating circumstances shall include "any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing" (subdivision (j)(9)).

Section to Section References. This section is referred to in §§ 39-13-204, 40-35-201.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served upon all counsel at interest in this cause, by delivering a true and exact copy to the offices of counsel of record shown at the addresses below or by placing a copy in the U.S. Mail, postage prepaid.

Attorney General Charles Burson
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615)741-3491
Counsel for the Respondent

District Attorney General Paul Phillips
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Huntsville, Tennessee 37756
(615)663-2544

All parties required to be served have been served.

This 2d day of August, 1990.

Harry P. Ogden by Richard S. Tennison

Harry P. Ogden
Counsel for the Petitioner

Supreme Court, U.S.
FILED
AUG 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RECEIVED
AUG 23 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 90-5395

PAUL GREGORY HOUSE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CHARLES W. BURSON
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(615) 741-4492

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-5395

PAUL GREGORY HOUSE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The petitioner, Paul Gregory House, has filed a petition for writ of certiorari to the Supreme Court of Tennessee.[1] The respondent, the State of Tennessee, respectfully submits this response to the petition.

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[1]Since the Supreme Court of Tennessee declined to accept jurisdiction of this case, the petition should be directed to the Court of Criminal Appeals of Tennessee. If the petitioner subsequently tenders a proper petition, the State asks that this response be deemed a response to that petition.

OPINION BELOW

The Opinion of the Court of Criminal Appeals of Tennessee is attached to the petition.

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on December 15, 1989. On March 5, 1990, the Supreme Court of Tennessee denied the petitioner's application for permission to appeal. This Court granted the petitioner additional time in which to file this petition.

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257.

QUESTIONS PRESENTED

I. Whether the mere possibility that the jury misconstrued sentencing instructions to require unanimous agreement on mitigating circumstances presents a substantial constitutional question.

II. Whether this Court should consider an issue raised for the first time in this petition.

STATEMENT OF THE CASE

The petitioner, Paul Gregory House, was convicted by a jury of murder in the first degree and sentenced to death by electrocution. The Supreme Court of Tennessee affirmed the conviction and sentence on direct appeal. State v. House, 743 S.W.2d 141 (Tenn. 1987).

On March 3, 1988, the petitioner filed a petition for post-conviction relief. Counsel was appointed and amended the petition to include additional grounds. The trial court rejected all issues and dismissed the petition.

The Court of Criminal Appeals of Tennessee affirmed the judgment on December 15, 1989. On March 5, 1990, the Supreme Court of Tennessee denied the application for an appeal by permission.

ARGUMENT

I. THE MERE POSSIBILITY THAT THE JURY MISCONSTRUED SENTENCING INSTRUCTIONS TO REQUIRE UNANIMOUS AGREEMENT ON MITIGATING CIRCUMSTANCES FAILS TO PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The opinion of the Court of Criminal Appeals reflects that the petitioner preserved a single issue for review. Specifically, he claimed that the jury charge may have led the jury to believe that it could not give effect to any mitigating evidence unless all jurors agreed on the existence of a particular mitigating circumstance, citing Mills v. Maryland, 486 U.S. 367 (1988). The Court of Criminal Appeals affirmed the judgment, relying upon the Tennessee Supreme Court's holding in State v. Thompson, 768 S.W.2d 239, 252 (Tenn. 1989), that jury instructions which conform to the language and structure of the Tennessee death penalty statute do not require the jury to agree upon the existence of any mitigating circumstance. The petitioner then filed an application for permission to appeal which likewise preserved this single issue.

The Supreme Court of Tennessee denied the application for permission to appeal on March 5, 1990. That same date, this Court invalidated a capital sentencing scheme in which jurors were not allowed to consider mitigating evidence unless all jurors agreed upon the

existence of the mitigating circumstances. McKoy v. North Carolina, ___U.S.___, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). The petitioner merely asks this Court to apply this principle of law to the circumstances of his case.

This Court has fully examined this issue in two recent opinions. The petitioner asserts only that the courts of Tennessee erroneously applied these precedents. This claim would be better presented in a federal habeas corpus action, in which the district court may review this claim under the principles of Mills and McKoy, and will consider those issues which were exhausted on direct appeal.

Since the petitioner has failed to present a substantial question of federal constitutional law, the petition for the writ of certiorari should be denied.

II. THIS COURT SHOULD NOT CONSIDER AN ISSUE RAISED FOR THE FIRST TIME IN THIS PETITION.

In his second issue, the petitioner asserts that the Tennessee death penalty statute does not assign a standard for weighing mitigating factors against aggravating circumstances and does not assign a burden of proof. The petitioner has failed to present this issue to the appellate courts of Tennessee. He raises this claim for the first time in this petition.

This Court has appellate jurisdiction of final judgments or decrees. 28 U.S.C. §1257(a). Consideration of an issue raised initially in a petition for certiorati would be an exercise of original jurisdiction. This Court should not consider an issue raised for the first time in the petition for certiorari. Illinois v. Gates, 462 U.S. 213, 217-224 (1983). Since the petitioner failed to present this issue to the Courts of Tennessee, the petition should be denied.

CONCLUSION

For these reasons, the State of Tennessee submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter

C. ANTHONY DAUGHTREY
Assistant Attorney General
(Counsel of Record)

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-4492

Counsel for Respondent

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

AFFIDAVIT OF CERTIFICATE OF SERVICE

I, C. ANTHONY DAUGHTREY, being first duly sworn, make oath that I am a member of the Bar of this Court.

I certify that on this 20th day of August, 1990, I deposited twelve (12) copies of this Response to Petition for Writ of Certiorari in a Unites States mailbox, with first class postage prepaid, properly addressed to the Clerk of this Court, and one (1) copy of this Response to Petition for Writ of Certiorari in a Unites States mailbox, with first class postage prepaid, properly addressed to counsel for petitioner, Mr. Harry P. Ogden, Attorney at Law, 620 Market Street, One Centre Square, Fifth Floor, P.O. Box 2425, Knoxville, Tennessee 37901 (615) 546-4646.

I further certify that all parties required to be served have been served.

C. ANTHONY DAUGHTREY
Assistant Attorney General

Sworn to and subscribed before me
on this 20th day of August, 1990.

NOTARY PUBLIC

My Commission expires: 5/20/92

SUPREME COURT OF THE UNITED STATES

PAUL GREGORY HOUSE *v.* TENNESSEE

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE, EASTERN DIVISION

No. 90–5395. Decided October 9, 1990

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, dissenting.

In both *Mills* v. *Maryland*, 486 U. S. 367 (1988) and *McKoy* v. *North Carolina*, 494 U. S. —— (1990) we vacated a death sentence based on jury instructions that, reasonably construed, prevented the jury from considering any mitigating circumstance it did not unanimously find to exist. Because I believe the instructions in this case suffer from the same infirmity, I would grant the petition for certiorari.

Petitioner was convicted of murder and sentenced to death. At the penalty phase of his capital proceeding, the trial judge instructed the jury that it could not impose the death penalty unless it found "*unanimously* that one or more . . . aggravating circumstances have been proven." *House* v. *State*, Union County C. C. A. No. 28 (Tenn. Crim. App., Dec. 15, 1989), p. 2 (emphasis added). Next, the judge directed the jury to "consider *as heretofore indicated* any mitigating circumstances." *Id.*, at 3 (emphasis added). The form provided to the jury for recording a death sentence stated, "We the jury, *unanimously find that there are no mitigating circumstances* sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances. . . ." *Id.*, at 5 (emphasis added).* Finding that

*In pertinent part, the jury instructions read as follows:

Your verdict must be *unanimous* as to either form of punishment [death or life imprisonment.] . . .

. . . . . .

No death penalty shall be imposed unless you find *unanimously* that one or more of the following specified statutory aggravating circumstances have been proven . . . beyond a reasonable doubt.

the instructions did not require juror unanimity on mitigating factors, the Tennessee Court of Criminal Appeals affirmed. *House* v. *State*, *supra*, at 6.

Assessment of petitioner's challenge to the disputed instructions is governed by our decisions in *Mills* v. *Maryland*, *supra*, and *McKoy* v. *North Carolina*, *supra*. In those decisions, we made clear that a rule preventing individual jurors from crediting mitigating circumstances not unanimously found to exist violated the cardinal principle of our capital jurisprudence that "'the sentencer may not . . . be *precluded*

. . . . . .

In arriving at the punishment, the jury shall consider *as heretofore indicated* any mitigating circumstances which shall include but not be limited to . . . .

. . . . . .

If the jury *unanimously* determines that at least one statutory aggravated circumstance or several statutory circumstances have been proved . . . and said circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death.

. . . . . .

[The] jury must include in its finding, that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

Upon such *unanimous finding*, each member of the jury shall affix his or her signature to said written finding and then return the said written verdict to the Court.

. . . . . .

You will be provided with two punishment forms. . . .

[On the Punishment of Death Form, should the jury impose the death sentence, it was required to attest:] We, the jury, *unanimously find that there are no mitigating circumstances* sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances listed above. . . .

. . . . . .

You may take the charge with you.

House v. *State*, *supra*, at 2–5 (emphasis added). According to the Tennessee Court of Criminal Appeals, these instructions conform to the language and structure of the then-effective Tennessee capital punishment statute, Tenn. Code Ann. § 39–2–203 (1982). See *House* v. *State*, *supra*, at 5. This provision has since been repealed and recodified at Tenn. Code Ann. § 39–13–204 (1990 Supp.).

from considering "any relevant mitigating evidence."'" *Mills*, *supra*, at 374–375, quoting *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986), quoting *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982) (emphasis added); see *McKoy*, *supra*, at —— (same). The only issue in this case is whether the instructions furnished to petitioner's jury should be viewed as imposing a unanimity requirement.

In my view, our decision in *Mills* speaks directly to this question. In *Mills*, the jury received a verdict form listing each potential mitigating and aggravating circumstance along with corresponding "yes" and "no" boxes. The trial judge instructed the jurors to mark "yes" if they *unanimously* concluded that an aggravating circumstance had been proven; otherwise they were to mark "no." *Id.*, at 378. The judge also instructed the jury that it had to be unanimous to mark "yes" for any mitigating factor. *Id.*, at 378, and n. 11. Mills challenged the constitutionality of his death sentence on the ground that the instructions required death if the jury unanimously found an aggravating circumstance but could not agree unanimously as to the existence of any particular mitigating circumstance. *Id.*, at 371. The Maryland Court of Appeals rejected this challenge, construing the verdict form to require unanimity in order to mark "no" with respect to a given mitigating circumstance, and not to preclude each juror from individually weighing any nonunanimous mitigating circumstance in considering whether to impose a death sentence. *Id.*, at 372–373.

Because we could not conclude, "with any degree of certainty, that the jury did not adopt [Mills'] interpretation," *id.*, at 377, we vacated his death sentence. We emphasized that nothing in the instructions or the form clarified for the jury that it could do something *other than* answer "no" if it could not reach unanimity on a particular mitigating circumstance. *Id.*, at 378–379, and n. 11. Thus, the verdict forms and instructions used in *Mills* created the "intuitively disturbing" possibility that a sole juror *could have* precluded the

remaining eleven jurors from considering mitigating circumstances which they all believed to exist. *Id.*, at 373. The prospect that a single, hold-out juror could have blocked such consideration, and consequently required the jury to impose the death penalty, was an outcome "we dare[d] not risk." *Id.*, at 384. We concluded that it would be the "height of arbitrariness" to uphold a death sentence in such circumstances. *Id.*, at 374.

The jury instructions in this case present the same impermissible risk. After charging the jury that it had to find aggravating circumstances "unanimously," the trial judge instructed the jury to consider mitigating circumstances "as heretofore indicated." The natural inference from the words "as heretofore indicated" is that findings of mitigating circumstances, like findings of aggravating circumstances, had to be unanimous. Moreover, as in *Mills*, the trial court did not instruct the jury on what it should do if it could not reach a unanimous conclusion on a potential mitigating circumstance. Nowhere did the instructions even remotely suggest that jurors were free to exercise individual judgment in considering nonunanimous mitigating factors. Rather, the jury appears to have been guided in the opposite direction by the "as heretofore indicated" language. The inference that nonunanimous mitigating factors must be disregarded entirely is reinforced by the trial judge's repeated statements that the jury could impose the death penalty only if it found "unanimously" that no mitigating circumstances outweighed any aggravating circumstances. Under these circumstances, reasonable jurors could justifiably have believed that they were not to consider any mitigating circumstance unless all jurors unanimously found it to exist.

Like the postverdict construction furnished by the Maryland Court of Appeals in *Mills*, the Tennessee Court of Criminal Appeals' conclusion that jurors remained free under Tennessee law to consider nonunanimous mitigation factors is beside the point. The decisive issue under *Mills* is whether

the *jury* could plausibly have read the instructions to require unanimity as to the existence of each mitigating circumstance. Because there is a "reasonable likelihood" that the jury in this case so understood the challenged instructions, *Boyde* v. *California*, 494 U. S. ——, —— (1990), I would grant the petition for certiorari and reverse.

Even if I did not believe that this case otherwise merited review, adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.

JUSTICE SOUTER took no part in the consideration or decision of this petition.